No. 95-709 (3)

Supreme Court, U.S.
FILED
DEC 4 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Petitioners,

v.

JO-ANN TEBBETTS, Administratrix of the Estate
of Rebecca Anne Tebbetts,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AS *AMICI CURIAE* SUPPORTING THE PETITION

PHILLIP D. BRADY
C. DEAN MCGRATH, JR.
American Automobile Manufacturers Association
1401 H Street, NW
Suite 900
Washington, DC 20005

CHARLES H. LOCKWOOD, II
Association of International Automobile Manufacturers, Inc.
1001 19th Street North
Suite 1200
Arlington, VA 22209

KENNETH S. GELLER*
ERIKA Z. JONES
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 463-2000

* *Counsel of Record for the Amici Curiae*

26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 2

A. The Safety Act 3

B. The Early History Of FMVSS 208 4

1. The Initial Passive Restraint Requirement (1967-1975) 4

2. The Elimination of Mandatory Passive Restraints (1976-1984) 5

C. The 1984 Amendment Of FMVSS 208 7

ARGUMENT 10

I. THE SUPREME COURT OF NEW HAMPSHIRE'S DECISION CONFLICTS WITH THE DECISIONS OF SEVERAL FEDERAL COURTS OF APPEALS, INCLUDING THE FIRST CIRCUIT, ON WHETHER FMVSS 208 IMPLIEDLY PREEMPTS "NO AIRBAG" CLAIMS 12

II. THE SUPREME COURT OF NEW HAMPSHIRE ERRED IN FINDING NO EXPRESS PREEMPTION . 16

III. IMMEDIATE REVIEW IS NECESSARY TO ADDRESS A QUESTION OF NATIONAL IMPORTANCE 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: **Page(s)**

Baldwin v. *Alabama*, 472 U.S. 372 (1985) 12
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 15-16
Carstensen v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995) 18
Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) 13
Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 13, 15
English v. *General Electric Co.*, 496 U.S. 72 (1990) 11
Felder v. *Casey*, 487 U.S. 131 (1988) 14
Fidelity Fed. Sav. & Loan Ass'n v. *de la Cuesta*, 458 U.S. 141 (1982) 11, 16
Freightliner Corp. v. *Myrick*, 115 S. Ct. 1483 (1995) 13, 19
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 11, 13
International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) 17
Kitts v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990) 12
Lawrence County v. *Lead-Deadwood School Dist.*, 469 U.S. 256 (1985) 16
Louisiana Pub. Serv. Comm'n v. *FCC*, 476 U.S. 355 (1986) 11
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 16-17
MVMA v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) 4-5, 7
Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986) 17
Pacific Legal Found. v. *DOT*, 593 F.2d 1338 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979) 4, 9
Pennsylvania R.R. v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915) 13, 17
Perry v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Pokorny v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990) 5, 12
Ritt v. *General Motors Corp.*, No. 88-1822 (7th Cir. 1989) 19
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 11
State Farm Mutual Auto. Ins. Co. v. *Dole*, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987) 10
Taylor v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990) 12
Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 17
Welsh v. *Century Products, Inc.*, 745 F. Supp. 313 (D. Md. 1990) 3
Wood v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990) . . . . . *passim*

Constitutional provision:

U.S. Const. art. VI, cl. 2 11

Statutes and regulation:

15 U.S.C. §§ 1381-1431 2
15 U.S.C. § 1391(1) 3
15 U.S.C. § 1392(a) 3
15 U.S.C. § 1392(d) . . . . . *passim*
15 U.S.C. § 1392(f)(3) 3
15 U.S.C. § 1397(k) . . . . . *passim*
15 U.S.C. § 1410b(b)(1) 5
15 U.S.C. § 1410b(b)(2)-(3) 5
15 U.S.C. § 1410b(b)-(f) 5
46 U.S.C. § 4311(g) 18
49 U.S.C. §§ 30101-30169 2-3
92 Stat. 450 (1978) 7
93 Stat. 1039 (1979) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Pub. L. No. 102-240, 105 Stat. 2086 (1991) 10, 14
49 C.F.R. § 571.208 . . . . . *passim*

Other Authorities:

H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679 14
H.R. Rep. No. 1776, 89th Cong., 2d Sess. (1966) 3-4
S. Rep. No. 1301, 89th Cong., 2d Sess. (1966) 4
S.Rep. No. 248, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1333 18
112 Cong. Rec. 14253 (1966) 4
120 Cong. Rec. 27815 (1974) 5
125 Cong. Rec. 36924 (1979) 7
32 Fed. Reg. 2415 (1967) 4
37 Fed. Reg. 3911 (1972) 5
38 Fed. Reg. 16073 (1973) 5
40 Fed. Reg. 16217 (1975) 5
41 Fed. Reg. 24071 (1976) 6
41 Fed. Reg. 36494 (1976) 5-6
42 Fed. Reg. 5071 (1977) 6
42 Fed. Reg. 34295 (1977) 6
46 Fed. Reg. 53419 (1981) 7
48 Fed. Reg. 39908 (1983) 7
49 Fed. Reg. 28962 (1984) 7-9
52 Fed. Reg. 10096 (1987) 10-11
Brief for the United States as *Amicus Curiae*, *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483 (1995) 19
Brief for the United States as *Amicus Curiae*, *Ritt* v. *General Motors Corp.*, No. 88-1822 (7th Cir. 1989) 19
Brief for the United States as *Amicus Curiae*, *Wood* v. *General Motors Corp.*, 494 U.S. 1065 (1990) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Department of Transportation, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection*, (Dec. 6, 1976) 6

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-709

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Petitioners,

v.

JO-ANN TEBBETTS, Administratrix of the Estate
of Rebecca Anne Tebbetts,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AS *AMICI CURIAE* SUPPORTING THE PETITION

INTEREST OF THE *AMICI CURIAE*

The American Automobile Manufacturers Association (AAMA) is a non-profit national trade organization. Its member companies, Chrysler Corporation, Ford Motor Company, and General Motors Corporation, are principally engaged in the manufacture and sale of motor vehicles, including passenger cars.

The Association of International Automobile Manufacturers, Inc. (AIAM) is a trade association organized as a non-profit District of Columbia corporation representing the U.S. subsidiaries of international automobile companies.[1] AIAM's member companies

[1] AIAM members include American Honda Motor Co., American Suzuki Motor Corporation, BMW of North America, Inc., Fiat Auto U.S.A., Inc.,

manufacture and distribute passenger cars, multipurpose passenger vehicles, and light trucks in the United States.

Amici's members have a vital interest in this case and its effect on their exercise of federal safety options under Federal Motor Vehicle Safety Standard (FMVSS or Standard) 208, 49 C.F.R. § 571.208. In particular, federal preemption of "no airbag" claims under FMVSS 208 is critically important to the automobile industry. The New Hampshire Supreme Court, however, has allowed respondent to proceed with a state law tort claim that would require petitioners to install airbags in their 1988 Ford Escort, and punish them severely for not doing so. This holding, which is contrary to the holding of every federal court of appeals to consider the issue, conflicts directly and irreconcilably with the longstanding determination by the Department of Transportation (DOT or Department) in FMVSS 208 that airbags should *not* — as a matter of federal safety policy — be required in petitioners' automobile. The effect on automobile safety of the decision in this case, which turns the Supremacy Clause and firmly established principles of federal preemption law upside down, will be profound.

AAMA and AIAM seek to inform the Court of the importance of the issues raised by the petition, particularly as they affect *amici*'s members and the automobile industry in general, and the devastating consequences of leaving those issues unresolved.[2]

STATEMENT

The Supreme Court of New Hampshire held in this case that the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified without substantive change at 49 U.S.C.

Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Land Rover North America, Inc., Mazda Motor America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Rolls Royce Motor Cars, Inc., Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., Volkswagen of America, Inc., and Volvo North America Corporation.

[2] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.

§§ 30101-30169) (Safety Act),[3] and FMVSS 208 do not preempt a common law tort claim that an automobile was defective because it was not equipped with an airbag. Pet. App. 5a-7a.

FMVSS 208 is "an unusual regulation," *Welsh* v. *Century Products, Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990), that has been the subject of extensive scrutiny over three decades by DOT, Congress, and the courts. The history of this Standard and the federal safety policies it embodies are at the core of the federal preemption issues presented by this case.

A. The Safety Act

Congress enacted the Safety Act in 1966 to protect the public "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and against unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1). Public safety is the "paramount purpose" of the Act. H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966). Congress sought to protect public safety by authorizing the Secretary of Transportation under the Act to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. 15 U.S.C. §§ 1392(a), 1392(f)(3).

Congress intended the safety standards promulgated under the Act to be "uniform national standards," *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990), and achieved that objective by preempting state law in the following express terms (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

---

[3] For ease of reference, we cite to the prior codification, which is cited by petitioners and was cited by the courts below.

In explaining the need to preempt state law, the Senate Report on the Act emphasized that "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 1301, 89th Cong., 2d Sess. 4 (1966). The House Report noted that "this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards." H.R. Rep. No. 1776, *supra*, at 17. As President Johnson observed: "The only alternative is unthinkable — 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14253 (1966).

The Safety Act also contains a so-called "savings" clause, which makes clear that Congress did not intend to occupy the entire field of automotive safety or create a federal affirmative defense to state tort claims. See pages 13-14, 16-18, *infra*. The clause provides that compliance with federal standards does not necessarily "exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

B. The Early History Of FMVSS 208

Pursuant to its broad statutory mandate, DOT in 1967 promulgated FMVSS 208, the occupant restraint standard, which required the installation of manual seat belts in all new cars. 32 Fed. Reg. 2415 (1967). "[T]he safety benefits of wearing seat belts are not in doubt." *MVMA* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

1. The Initial Passive Restraint Requirement (1967-1975). Because automobile users often fail to buckle their manual seat belts, DOT began to consider the feasibility of "passive" or "automatic" restraint systems — including airbags. Between 1969 and 1976, the federal government conducted over 2,000 tests of such devices to evaluate their utility. *Pacific Legal Found.* v. *DOT*, 593 F.2d 1338, 1344 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979).

During this formative period of the federal regulatory program, DOT proposed a requirement that manufacturers install a

passive restraint system selected in their discretion, but later postponed that requirement until the 1976 model year. 37 Fed. Reg. 3911 (1972). In the interim, the Department continued to grant manufacturers the option to install manual "lap and shoulder belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected" — an option that nearly all manufacturers exercised. *State Farm*, 463 U.S. at 35-36. One year later, DOT suspended its passive restraint proposal, citing the need for further study. 38 Fed. Reg. 16073 (1973).

Responding to a wave of consumer protest, Congress intervened in 1974 to supervise the future development of FMVSS 208 and rejected DOT's "ignition interlock" requirement. 15 U.S.C. § 1410b(b)(1). Congress also declared its strong preference for traditional seat belt safety systems and provided that a non-belt safety system would be permissible only if FMVSS 208 gave manufacturers the option to install a seat belt system instead. 15 U.S.C. § 1410b(b)(2)-(3). Congress prohibited the Department from mandating airbags or any other non-belt safety systems unless it complied with special hearing procedures and awaited the results of a review by both Houses of Congress. 15 U.S.C. § 1410b(b)-(f). This provision reflected Congress' opposition to inadequately considered proposals mandating passive restraints (such as airbags) and Congress' belief that it "should not require of the automobile industry and the purchasing public anything more" than the familiar "seat belt and shoulder harness" restraint system. 120 Cong. Rec. 27815-27816, 27822-27823 (1974). Thus, "Section 1410b shows that Congress intended manual seat belts to remain one of the options for complying with federal restraint system requirements." *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116, 1123-1124 (3d Cir.), cert. denied, 498 U.S. 853 (1990).

Following this policy declaration by Congress, DOT renewed its study of passive restraints, but continued to allow compliance with FMVSS 208 by means of manual seat belts or passive restraints. 40 Fed. Reg. 16217, 16218 (1975).

2. *The Elimination of Mandatory Passive Restraints (1976-1984).* Growing concern over the effectiveness and public acceptability of passive restraint devices prompted Secretary of Transportation William Coleman to defer (41 Fed. Reg. 36494

(1976)) and ultimately to rescind (42 Fed. Reg. 5071 (1977)) a proposed passive restraint requirement. Secretary Coleman explained the policy objections to a passive restraint requirement (41 Fed. Reg. 24071 (1976)):

> These passive restraint-equipped vehicles will cost more, but, in tests to date, have been found to provide no materially greater protection to those individuals who already use lap and shoulder seat belts. Nevertheless, these individuals will have to pay more for their automobiles, without any measurable benefit * * *.

Moreover, Secretary Coleman was concerned about the "feasibility" of manufacturing millions of reliable passive restraints. *Id.* at 24072.

The Secretary also justified his decision to reject a passive restraint requirement by referring to public opinion (Department of Transportation, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection*, at 11-12 (Dec. 6, 1976)):

> [A] substantial majority of Americans oppose the Federal government's mandating passive restraints * * *. There is widespread and serious concern among members of the public with respect to the likelihood and consequences of inadvertent air bag deployment, the possibility that airbags may cause or exacerbate injuries, and the question of whether airbags will deploy properly in situations in which they are needed.

After considering these factors, the Secretary found that a passive restraint requirement would provoke "widespread negative public reaction" and a congressional repeal of the standard after the manufacturers had retooled their production facilities. In short, a passive restraint requirement would "constitute a general setback to the auto safety movement." *Id.* at 64.

In 1977, Secretary Brock Adams reaffirmed that airbags should not be mandated. He concluded that manufacturers should be required to install some type of passive restraint in the future, but specifically rejected a rule that would order immediate installation of airbags or any other system in view of the severe technological and practical difficulties that such a requirement would cause. 42 Fed. Reg. 34295, 34296 (1977).

In response to the Secretary's proposal to require passive restraints at some point in the future, Congress intervened again in opposing mandatory passive restraints and approving manual seat belts. It provided in DOT's appropriation legislation for 1979 and 1980 that "[n]one of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system other than a belt system." 92 Stat. 450 (1978); 93 Stat. 1039 (1979). In forbidding the use of federal funds to mandate any "occupant restraint system" other than "a belt system," Congress distinguished between the familiar and publicly acceptable "active restraint system, which is the lap-shoulder belt that we have on cars today," and "a passive restraint system, which in practice means the airbag for large cars, and the automatic seat belt for small cars." 125 Cong. Rec. 36924, 36926 (1979).

Following this direction by Congress, Secretary Drew Lewis decided against mandatory passive restraints in 1981, affirming "the current option of providing either automatic or manual occupant restraints." 46 Fed. Reg. 53419, 53425 (1981). That decision was later set aside by this Court on the ground that it was not adequately explained. The Court affirmed, however, the Secretary's power to suspend any passive restraint requirement pending further agency review, *State Farm*, 463 U.S. at 57 n.21, and the Secretary promptly did so. 48 Fed. Reg. 39908 (1983).

On remand, Secretary Elizabeth Dole conducted a "thorough review of the issue of automobile occupant protection," including a study of the voluminous record on the subject. 49 Fed. Reg. 28962, 28964, 28967-28975, 28984-28996 (1984).

C. The 1984 Amendment Of FMVSS 208

As amended in 1984, FMVSS 208 called for careful implementation of passive restraint standards (either airbags or automatic seat belts) over a four-year period: 10% of cars manufactured during the 1987 model year (*i.e.*, between September 1, 1986 and August 31, 1987) were required to have passive restraints, 25% for the 1988 model year, 40% for the 1989 model year, and 100% for

the 1990 model year. 49 Fed. Reg. 28962, 28999-29000 (1984).[4] The Secretary explained that the phase-in was necessary because of "the need for the public to become accustomed to the technology and the need for protection, and [because] an across-the-board mandate too quickly could engender adverse public reaction. The Department's decision to gradually phase in the requirements of this rule will help build public acceptance of this rule." *Id.* at 28989.[5]

The Secretary's decision not to mandate airbags was premised on numerous safety concerns, including doubts about the efficacy of airbags (particularly in smaller cars in which the minimal space between the front of the car and the passenger leaves little time for the bag to inflate, *id.* at 28947, 29001) and apprehension that the high cost of airbags would lead owners not to replace them after deployment, with the result that "there would be no protection for the front seat occupants of such an automobile." *Id.* at 29001.

To allay public concerns about airbag technology, the Department explicitly encouraged manufacturers to offer a choice between automatic safety belts and airbags. The Secretary noted that "[i]t may be easier to overcome these [public] concerns if airbags are not the only way of complying with an automatic occupant protection requirement. Under the rule being issued, if people have concerns about airbags, they can purchase automobiles that use automatic belts." *Ibid.*

The Secretary's apprehension about the public acceptability of the automatic protection requirements of FMVSS 208 was not

---

[4] The rule alternatively allowed manufacturers to use other technologies, such as "passive interiors," to meet the passive protection requirement (*id.* at 28995), although no such methods were known to meet the pertinent standards.

[5] The new rule provided, however, that the passive restraint mandate would be rescinded if, by 1989, states having two-thirds of the nation's population enacted laws requiring the use of ordinary three-point seat belts (so-called "mandatory use laws" or "MULs"). *Id.* at 28963-29000. Thus, DOT clearly preferred belt systems to airbags, noting that "the widespread enactment of MULs would provide increased safety benefits much more quickly and at a much lower cost, thus making recision [of the passive restraint requirement] clearly justifiable." *Id.* at 29003. The 1989 deadline ultimately was not met and the passive restraint mandate stayed in effect.

fanciful. The Secretary found that "[a]irbags engendered the largest quantity of, and most vociferously worded, comments to the docket. Some people have serious fears or concerns about airbags. If airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of airbags. This could lead to their being disarmed, or, perhaps, to a repeat of the interlock reaction." *Id.* at 29001. The Secretary also pointed out, in this regard, that she was required by law to consider "[t]he public acceptance of safety devices likely to be installed in compliance with" FMVSS 208. See *id.* at 28987; *Pacific Legal Found.*, 593 F.2d at 1345-1346.

Finally, the Secretary decided that requiring installation of a particular passive restraint device, such as an airbag, would stifle innovation in restraint systems that might provide greater safety (49 Fed. Reg. at 29001):

> [B]y restricting the manufacturers, the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems. Similarly, the development of passive interiors, being pursued by GM, would be stymied under such an option.

Thus, Secretary Dole specifically found that a mandatory airbag requirement would be contrary to federal safety goals because it "runs the risk of killing the development of more effective, efficient occupant protection systems." *Ibid.* And DOT sought to encourage manufacturers to experiment with different passive restraint technologies, rather than to mandate "all airbag" fleets, in order to develop empirical data concerning the relative effectiveness of various restraint systems. *Id.* at 29000-29001.

In sum, the standard adopted by Secretary Dole in 1984 — like the standards adopted by all of her predecessors — *explicitly rejected a mandatory airbag requirement* and reaffirmed the need to encourage automobile manufacturers to develop a variety of alternative occupant restraint systems. *Id.* at 29000-29002. In light of DOT's findings about the need for a gradual public introduction to passive restraints, and the likelihood of adverse public reaction to an all-airbag mandate, the Secretary chose to implement her statutory obligation by providing *both* a phase-in schedule for the rule *and* an explicit encouragement for manufacturers to ensure the

availability of cars equipped with automatic safety belts instead of airbags. It is these federal purposes that would be frustrated by permitting juries to second-guess which passive restraints should have been installed in a particular vehicle.

Following DOT's renewed decision not to require airbags, the D.C. Circuit affirmed that rule in *State Farm Mutual Auto. Ins. Co.* v. *Dole*, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987). The court noted that the "ultimate decision not to require airbags" rested on a meticulous weighing of competing interests and a specific finding that the high costs associated with airbags threatened to reduce safety. *Id.* at 487-488 & n.27. The court held that "such details of cost-benefit analysis are 'most appropriately entrusted to the expertise of an agency'" and affirmed DOT's conclusion that public concerns about passive restraints could "best be addressed through real-world experience in the marketplace rather than by regulatory fiat." *Id.* at 488.[6]

ARGUMENT

It is undisputed that the automobile that Rebecca Anne Tebbetts was driving at the time of her accident, a 1988 Ford Escort, fully satisfied the requirements of FMVSS 208, because it was equipped with a safety restraint system consisting of a motorized, automatic shoulder belt and a manual lap belt. Pet. 4. In particular, the automobile was not required by FMVSS 208 to have an airbag; the Standard then in effect granted manufacturers an option — for safety reasons — to install either an airbag or some other type of passive restraint system. Indeed, in 1987 Secretary Dole reaffirmed the need for flexibility and choice in passive restraint systems, 52 Fed. Reg. 10096 (1987), and noted that federal safety policy purposely did not "require manufacturers to

---

[6] In 1991, Congress amended the Safety Act to require the Department of Transportation to modify FMVSS 208 to mandate airbags in 95% of 1997 model passenger cars and 100% of the 1998 models. Pub. L. No. 102-240, § 2508. In passing this legislation, Congress noted that it did not seek to change the preemptive effect of FMVSS 208 for vehicles manufactured without airbags *before* they were required by federal law. Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086 (1991); see page 14, *infra*.

install airbags or any other particular type of automatic restraint system." *Id.* at 42441.

Respondent nonetheless seeks to punish petitioners with massive tort liability for failing to install an airbag in the 1988 Ford Escort. This claim, however, is preempted by the Safety Act and FMVSS 208. The Supremacy Clause of the Constitution requires that any conflict between federal law (whether a statute or a regulation) and state law must be resolved in favor of federal law. U.S. Const. art. VI, cl. 2; *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). Federal preemption occurs in three contexts. First, Congress may expressly declare that state law is preempted. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). Second, Congress may implicitly override state law where the breadth of a federal statute indicates a congressional intent to occupy the field exclusively. See *English* v. *General Electric Co.*, 496 U.S. 72, 78-79 (1990). Third, state law may conflict with federal law either by making it impossible "to comply with both state and federal requirements," *id.* at 79, or by standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Application of these principles to this case leads to the inescapable conclusion that respondent's tort claim based on petitioners' decision not to install an airbag is both expressly and impliedly preempted by the Safety Act. Federal law granted petitioners the express option — as a matter of safety policy developed over decades of laborious study by an expert federal agency — to equip the 1988 Ford Escort with a motorized, automatic shoulder belt and a manual lap belt rather than an airbag. And the Safety Act, in Section 1392(d), expressly preempts any inconsistent state law requirements.

Nevertheless, the Supreme Court of New Hampshire joined a minority of the lower courts in holding that FMVSS 208 does not preempt an inconsistent state common law rule that would *mandate* airbags. Pet. App. 5a-7a. The decision below, which conflicts with the decisions of every federal court of appeals to consider this

important issue, cannot stand in light of the Supremacy Clause and this Court's precedents. Review by this Court is essential.

I. THE SUPREME COURT OF NEW HAMPSHIRE'S DECISION CONFLICTS WITH THE DECISIONS OF SEVERAL FEDERAL COURTS OF APPEALS, INCLUDING THE FIRST CIRCUIT, ON WHETHER FMVSS 208 IMPLIEDLY PREEMPTS "NO AIRBAG" CLAIMS

1. The New Hampshire Supreme Court's decision in this case squarely conflicts with decisions by the First, Third, Tenth, and Eleventh Circuits finding implied conflict preemption of common law tort claims by the Safety Act and FMVSS 208. See *Wood* v. *General Motors Corp.*, *supra*; *Pokorny* v. *Ford Motor Co.*, *supra*; *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990). Indeed, as petitioners explain (see Pet. 9-13; Pet. App. 37a-50a), the decision below joins more than 150 other lower court decisions that have addressed the preemption question over the last ten years. The split among these decisions is broad, growing, and irreconcilable. Only this Court can definitively resolve the important issue of federal law presented by this case.

It is especially imperative that the Court resolve the conflict exacerbated by the decision below because the New Hampshire Supreme Court's ruling is directly at odds with a decision of the First Circuit. The First Circuit held in *Wood* that "no airbag" tort claims such as respondent's are impliedly preempted by the Safety Act and FMVSS 208. Thus, if petitioners had been sued in federal court in New Hampshire, respondent's claim would have been dismissed; because petitioners instead were sued in New Hampshire state court, they are now faced with potentially massive damages liability. It is wholly intolerable for the meaning of a federal statute to depend upon whether the plaintiff chooses to file suit in state or federal court. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985) (resolving "significant conflict" between the Eleventh Circuit and the Supreme Court of Alabama).

2a. Review of the New Hampshire Supreme Court's implied preemption ruling is also warranted because the court below justified its failure to follow the "majority of courts faced with a

similar preemption inquiry" (Pet. App. 6a) on the basis of a misinterpretation of this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). Specifically, the court below held that the Safety Act's preemption clause, interpreted "in tandem" with the Act's "savings" clause, "provides a 'reliable indicium of congressional intent with respect to state authority'" (*id.* at 517) and thus demonstrates Congress' intent not to allow implied conflict preemption under the Safety Act. Pet. App. 5a-6a. In the New Hampshire Supreme Court's view, "[h]ad the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood*, Ford's [implied preemption] argument would be more persuasive." *Id.* at 6a.

The New Hampshire Supreme Court's interpretation of *Cipollone* is plainly wrong. Just last Term, this Court stated in *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483, 1488 (1995), that the existence of an express preemption clause in a statute does not "foreclose[] any possibility of implied pre-emption" and that *Cipollone* does not "obviate the need for analysis of an individual statute's pre-emptive effects." Moreover, the Court went on to hold that the express preemption provisions of the Safety Act *do not* eliminate the need to engage in an implied preemption analysis; the Court rejected the implied preemption defense in *Myrick* because it found that the plaintiffs' "common-law actions do not conflict with federal law" and do not "frustrate 'the accomplishment and execution of the full purposes and objectives of Congress'" (*id.* at 1488, quoting *Hines*, 312 U.S. at 67)), *not* because it was inappropriate to consider implied preemption under the Act.

There are several reasons why the Safety Act's preemption clause does not provide a reliable indication of congressional intent to preclude implied preemption of state laws that conflict with the federal scheme embodied in the Act. To begin with, Section 1397(k), the so-called "savings" clause, indicates Congress' intent *not* to occupy the entire field of motor vehicle safety, so that common law claims could proceed in areas *not* covered by a federal safety standard. Faced with savings clause language in other statutes, this Court has interpreted them in this fashion. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981); *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 130 (1915). Yet there would have been no need for

Congress to have been concerned with implied "field" preemption if the mere existence of the express preemption provision precluded any implied preemption defense.

Furthermore, a recent amendment to the Safety Act, not discussed by the New Hampshire Supreme Court, provides additional evidence that the court's conclusion on congressional intent is wrong. In reauthorizing the Safety Act in 1991, Congress explicitly ratified implied preemption in directing DOT to amend FMVSS 208 to require airbags in all new motor vehicles. See note 6, *supra*. Congress recognized that several federal courts of appeals had held that tort suits based on the failure to install airbags were impliedly preempted and that an "all airbag" amendment might be construed as disturbing those precedents. See Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086 (1991); H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. The 1991 amendment therefore specified that it

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Section 2508(d), 105 Stat. 2086. The conference report, citing the prior decisions on implied preemption, explained that Congress "do[es] not want by this section to change the law on liability as it existed prior to enactment" (*i.e.*, late November 1991). H.R. Conf. Rep. No. 404 at 403, *reprinted in* 1991 U.S.C.C.A.N. at 1783. This legislation and its history show conclusively that — contrary to the New Hampshire Supreme Court's holding — the Safety Act's express preemption provision does not reliably indicate Congress' intent to preclude implied preemption analysis.[7]

---

[7] The New Hampshire Supreme Court also erred in relying on a "presumption against preemption" in finding no implied conflict preemption under the Safety Act. Pet. App. 6a. This Court has held that there is no presumption against preemption in deciding whether state law conflicts with federal law. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988). Indeed, absent compelling evidence to the contrary, it should be presumed that Congress did not intend to eliminate the

b. If the New Hampshire Supreme Court had not misconstrued *Cipollone*, it would have been compelled to agree with the First Circuit in *Wood* that respondent's tort claim was impliedly preempted by the Safety Act. As described in detail above (see pages 3-10, *supra*), the central feature of the federal safety program codified in FMVSS 208 was a carefully calibrated plan to encourage the automobile industry to offer a variety of passive restraint technologies in the market. The goal of Congress and DOT, over more than two decades, was to provide design flexibility to foster technological innovation and field experience that would make passive restraint systems safer and more acceptable to the general public. Moreover, DOT sought to encourage manufacturers to experiment with different passive restraint technologies, rather than to mandate "all airbag" fleets, in order to develop empirical data concerning the relative effectiveness of various restraint systems. The element of "choice" in the federal program was, therefore, not an expression of neutral indifference to airbags by DOT, but a purposeful element of a program designed to address the serious, substantive doubts about the utility, public acceptability, and feasibility of requiring the industry to adopt airbags prematurely.

By contrast, the state law tort standard advocated by respondent would punish automobile manufacturers for not taking the very step that the federal program rejected as contrary to federal safety policy: installing airbags in every car built in 1988. The effect of upholding such liability would be directly to nullify the policy balances that are at the heart of FMVSS 208. It is difficult to imagine a clearer example of state law acting as an "obstacle" to the "accomplishment and execution" of a federal administrative program — a program with "an intricate and contentious history of over 20 years" that has involved intensive administrative and congressional attention and effort. *Wood*, 865 F.2d at 398. Respondent's common law tort claim is impliedly preempted because it would strip away an option (and attendant restraint design flexibility) that Congress and DOT believed to be essential to achieve federal policy goals. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 708-709 (1984) (state law cannot deprive

---

implied preemption doctrine. After all, why would Congress want to authorize state action that conflicts with or frustrates the purposes of federal law?

regulated entities of "flexibility and discretion" deliberately conferred by federal law); *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 260-261, 270 (1985) (state law is preempted to the extent it eliminates "flexibility" contemplated by federal law); *de la Cuesta*, 458 U.S. at 155 (same).

II. THE SUPREME COURT OF NEW HAMPSHIRE ERRED IN FINDING NO EXPRESS PREEMPTION

The New Hampshire Supreme Court also erred in holding that respondent's tort claim was not expressly preempted. Despite the clear preemptive language of Section 1392(d), the court based its holding on Section 1397(k) of the Act, the so-called "savings" clause. Pet. App. 4a-5a. Indeed, the court acknowledged that, in the absence of Section 1397(k), "the language of the preemption clause alone might suggest that common law actions are preempted." *Id.* at 4a.

Section 1397(k) provides that compliance with a FMVSS "does not exempt any person from any liability under common law." This section, however, was intended to serve two functions that are far narrower than the broad "saving" function ascribed to it by the New Hampshire Supreme Court. The court below failed to address either of these functions — or the many decisions of this Court supporting this narrower interpretation. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) ("general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision").

1. As petitioners note (Pet. 14-20), the plain language of Section 1397(k) indicates that it was designed to preclude courts from recognizing a federal affirmative defense of compliance with government statutes or regulations. This reading of the clause is confirmed by comparing Section 1397(k) with other portions of the Safety Act that were in fact intended to preserve common law rights and remedies. For example, Section 1392(d) contains two specific exceptions to the preemption mandate, using unmistakable "saving" language. See Pet. 16-17. In addition, Section 1420 of the Act provides that

> [t]he provisions of this part [pertaining to safety recalls] shall not create or affect any warranty obligation under State or

> Federal law. Consumer remedies under this part are in addition to, and not in lieu of, any other right or remedy under State or Federal law.

Plainly, Congress knew how to enact true "savings" clauses preserving state rights and remedies from federal preemption, and explicitly did so in several instances. By contrast, Section 1397(k) does *not* purport to preserve state law rights or remedies that would otherwise be preempted; it merely indicates that the Act does not create a federal affirmative defense based on "compliance with" a federal safety standard.

2. Section 1397(k) also preserves common law actions that do not conflict with, or frustrate the purpose of, applicable federal safety standards — even if they may be said to relate to the "same aspect of performance." This case is an excellent example: FMVSS 208 expressly granted for safety reasons (see pages 3-10, *supra*), a choice whether to install airbags. Section 1397(k) would thus preserve a common law claim that an airbag was negligently manufactured. On the other hand, it would not preserve a common law action, such as the claim under review here, seeking to recover damages merely for exercising a federally granted safety option to install seat belts rather than an airbag. Such a lawsuit is inconsistent with FMVSS 208 because it extinguishes a choice granted, as a matter of safety, by DOT. See *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install claim from a claim that a chosen system was not properly designed, and holding that the latter is not preempted).

This Court has often warned that general savings clauses should not be construed in an indiscriminate fashion to allow common law claims that would subvert a federal regulatory scheme. In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a general savings clause could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the statute to "destroy itself." *Ibid.*; see *Morales*, 504 U.S. at 385; *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-495 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Pennsylvania R.R.*, 237 U.S. at 129.

Congress was surely aware of this Court's longstanding view that a general savings clause does not preclude conflict preemption, and it could not have intended a contrary result under the Safety Act without explicitly so providing. Yet Congress did not include even a general savings clause in the Act, opting instead for a provision that precludes merely an affirmative defense of compliance with federal standards. See *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430, 432 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995) (interpreting narrowly similar "savings" clause language).[8]

The New Hampshire Supreme Court ignored this Court's precedents and the narrow focus of Section 1397(k) in construing it to "save" a state law claim that would render Section 1392(d) largely meaningless.

III. IMMEDIATE REVIEW IS NECESSARY TO ADDRESS A QUESTION OF NATIONAL IMPORTANCE

Prompt review of the New Hampshire Supreme Court's ruling is essential. The decision below reflects substantial confusion concerning the legal principles governing, and a sharp conflict in the lower courts on, an issue of exceptional significance affecting national automobile safety and the automobile industry.

1. The decision in this case dramatically undermines an important federal safety regulation that was explicitly sanctioned by Congress and that was supported by decades of extensive study by an expert federal agency. Not surprisingly, the United States has repeatedly taken the position before this Court and other courts that a state tort law claim (such as respondent's) that would punish a manufacturer for not installing an airbag would conflict with

---

[8] The *Carstensen* court interpreted the "savings" clause of the Federal Boat Safety Act, 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law"), which is virtually identical to Section 1397(k), and held that the Act's "general savings clause should not be interpreted to subvert th[e] goal [of establishing uniform boating safety requirements]." 49 F.3d at 432. The court observed that the "stated purpose of the savings clause is 'to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability.' S.Rep. No. 248, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1333, 1352." 49 F.3d at 432.

Standard 208 and is preempted. See, *e.g.*, Brief for the United States as *Amicus Curiae*, *Wood* v. *General Motors Corp.*, 494 U.S. 1065 (1990), at 13 (policy underlying Standard 208 is "likely to be frustrated if manufacturers are held liable for not installing airbags in their vehicles"); Brief for the United States as *Amicus Curiae*, *Ritt* v. *General Motors Corp.*, No. 88-1822 (7th Cir. 1989), at 24 (there would be an "actual conflict" between a "state tort ruling imposing liability on the basis of a failure to install airbags" and Standard 208).

Just last Term, the United States informed this Court that

> [i]n promulgating * * * Standard [208], the Secretary concluded that, because of a history of substantial consumer resistance to automatic, or passive, occupant restraint systems, passenger safety would be best served by a diversity of such restraint systems, including but not limited to airbags, which would promote public acceptance of passive restraints. The Secretary explicitly determined that an all-airbag rule would have disserved the safety purposes of the Act.

Brief for the United States as *Amicus Curiae*, *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483 (1995), at 28. As a result, the federal government concluded that "[i]nterference with that federally protected freedom of choice through state tort judgments would * * * conflict[] with Standard 208." *Ibid.*

Thus, the decision by the New Hampshire Supreme Court in this case, allowing a state law "no airbag" claim to proceed, undermines FMVSS 208 and the important federal safety policies that the regulation embodies.

2. For the member companies of *amici*, and the automobile industry in general, the decision in this case raises concerns both of fundamental fairness and enormous potential liability. There are literally millions of automobiles on the road today that are not equipped with airbags, or other specific passive restraints, because manufacturers duly followed longstanding federal policy not to require installation of one type of restraint system. If common law claims such as respondent's were allowed to proceed, automobile manufacturers would be punished — in an unforeseeable, retroactive manner and with unprecedented severity — for adhering to

federal safety policy and conforming to what was supposed to be a "national" safety standard (*Wood*, 865 F.2d at 412). Instead of a national rule, juries in some states would punish manufacturers for not having four-point seat belts, others could require three-point seat belts, yet others frontal airbags (driver's or passenger's side, front or rear), and still others motorized seat belts — or some combination of these and a host of other restraint devices.

Litigation over the preemptive effects of FMVSS 208 has proceeded for a decade, with no end in sight. The lower courts are hopelessly divided, and the decision below — the first by a state supreme court to disagree with the federal courts of appeals — is certain to encourage further tort suits. Only this Court can put an end to this controversy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILLIP D. BRADY
C. DEAN MCGRATH, JR.
American Automobile Manufacturers Association
1401 H Street, NW
Suite 900
Washington, DC 20005

CHARLES H. LOCKWOOD, II
Association of International Automobile Manufacturers, Inc.
1001 19th Street North
Suite 1200
Arlington, VA 22209

KENNETH S. GELLER*
ERIKA Z. JONES
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 463-2000

* *Counsel of Record for the Amici Curiae*

DECEMBER 1995